Supreme Court, U.S.

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No. _____

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In The

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID D. ROACH,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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October 21, 1997

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QUESTIONS PRESENTED

1. In a prosecution for criminal contempt for violation of an order the presiding district judge had issued in a civil case in which the criminal defendant was not a party, do comments the judge makes at hearings held in the civil case before the defendant has answered to the criminal charge which demonstrate the judge's belief that the defendant violated his order and lacks credibility, establish an appearance of partiality requiring the judge's recusal under the authority of 28 U.S.C. §§ 144 and 455, and this Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994)?

2. Whether a district court presiding over a criminal prosecution for contempt may limit the penalty it will impose upon conviction for the sole purpose of depriving the defendant of his Sixth Amendment right to a jury trial, when there exists a federal statute unknown to the court and the parties that entitles the defendant to a jury trial, and the district court has failed to engage in an assessment of the seriousness with which society regards the offense?

3. Whether an appeals court violates this Court's decision in *Elder v. Holloway*, 510 U.S. 510 (1994), and its duty to apply the law in effect at the time of its decision, when it refuses to consider statutory authority entitling the defendant to a trial by jury that was discovered after the appeals court's decision denying the claim but brought to its attention in a timely filed petition for rehearing?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

David D. Roach respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered in this case.

OPINION AND ORDERS BELOW

The order for Mr. Roach to show cause why he should not be held in criminal contempt was issued on December 20,

1995, and is set forth in the Appendix ("App.") at 44a. The district court's written verdict, issued October 6, 1996, is set forth at 17a. The district court's oral verdict is set forth at 19a. The decision of the United States Court of Appeals for the District of Columbia Circuit, affirming Mr. Roach's conviction but remanding for resentencing, *United States v. Roach*, 108 F.3d 1447 (D.C. Cir. 1997), is at 1a. The circuit court's orders denying the petition for rehearing and rehearing *en banc* are at 40a and 42a.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1997. Rehearing was denied on July 23, 1997. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, U.S. CONST. amend. VI, is set out in full at App. 46 a.

28 U.S.C. §§ 144 and 455 are set out in pertinent part at App. 48a.

42 U.S.C. § 2000h is set out in pertinent part at App. 48a.

STATEMENT OF THE CASE

Procedural History

In 1995, Mr. Roach was the warden of the maximum

security facility for the District of Columbia's Department of Corrections (the "Department"). His immediate supervisor was Bernard Braxton, the Department's Deputy Director for Institutions.

In October 1995, attorneys for Dorothy Smith, a correctional officer then assigned to the maximum security facility, filed a motion with the district court asking that Mr. Roach and Mr. Braxton show cause why they should not be held in criminal contempt for allegedly violating that portion of an order the district court had issued barring retaliation against Department employees who made complaints of sexual harassment. The district court had issued that remedial order after verdicts were rendered in favor of the plaintiffs, women employees of the Department, in a class action lawsuit alleging violations of §§ 703 and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.* (1994), through a widespread pattern of sexual harassment and retaliation by management and employees of the Department. *Neal, et. al v. Department of Corrections* (hereinafter "*Neal*"), Civ. A. No. 93-2420 (D.D.C. 1995). Officer Smith claimed that Mr. Roach and Mr. Braxton had taken retaliatory disciplinary action against her for filing complaints of sexual harassment against fellow officers.

As the "deciding official"[1] in the first of the two disciplinary proceedings against Officer Smith, Mr. Roach credited the finding of the fact-finding committee which had

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[1]Under District of Columbia law, a "deciding official" is the person authorized to make the decision whether to remove, suspend, or otherwise punish an employee for misconduct. D.C. Personnel Regs., Pt. I, Chap. 16 at 16-I-2.

investigated the complaint, that Officer Smith's complaint was false, and he upheld the proposal of his deputy warden that Officer Smith be terminated from employment for filing the false claim. In reaching that decision, Mr. Roach considered but rejected a contrary recommendation from a "disinterested designee."[2] Mr. Braxton later rescinded Mr. Roach's decision. The basis of the request for Mr. Braxton to show cause was his authorizing the initiation of disciplinary proceedings against Officer Smith in response to the recommendation of the fact-finding committee investigating her third complaint of sexual harassment.

On December 20, 1995, the district court, without holding a hearing or considering the lesser option of civil contempt, issued the order for Mr. Roach and Mr. Braxton to show cause why they should not be held in criminal contempt. (App. 44a). In that order the court announced its intention to limit the penalty to 180 days imprisonment and thereby preclude Mr. Roach and Mr. Braxton from obtaining a jury trial. At their arraignment on March 19, 1996, Mr. Roach and Mr. Braxton demanded that the district court afford them a jury trial, but the court summarily denied the motion. Thereafter, Mr. Roach filed a motion, pursuant to 28 U.S.C. §§ 144 and 455, seeking the district court's recusal from the case and renewing the request for a jury trial. The district court denied that motion, too, without a hearing. Mr. Roach then filed a petition for writ of mandamus with the circuit court. In an unreported opinion that petition was denied on August 13, 1996 (App. 38a).

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[2]A "disinterested designee" reviews the proposed adverse employment action and the employee's response and makes non-binding recommendations to the deciding official regarding the proper course of action. D.C. Personnel Regs., Pt. I, Chap. 16 at 16-I-3.

Trial commenced on September 30, 1996. On October 8, 1996, the district court issued its verdict. Despite uncontradicted testimony from virtually every witness at trial that both Mr. Roach and Mr. Braxton were men of the highest integrity and that Mr. Roach had been a champion of women's rights in the Department -- including testimony to that effect from the disinterested designee and two of the lead plaintiffs in the underlying civil rights lawsuit -- the district judge found both Mr. Roach and Mr. Braxton guilty of contempt for retaliating against Officer Smith. After announcing his verdicts, the judge immediately sentenced both Mr. Roach and Mr. Braxton to maximum 180-day sentences and refused to stay execution of his sentences. The following day, the circuit court stayed execution of the sentence.

On April 1, 1997, the court of appeals reversed Mr. Braxton's conviction, finding the evidence insufficient to sustain his conviction, but it affirmed Mr. Roach's conviction, although it remanded his case to the district court for resentencing. *United States v. Roach*, 108 F.3d 1477 (D.C. Cir. 1997) (App. 2a, 10a, 14a). After the panel had issued its opinion but before the time for petitioning for rehearing had expired, Mr. Roach learned of the existence of 42 U.S.C. § 2000h, which affords defendants the right to a jury trial when they are charged with criminal contempt arising under titles II-VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1994). In his petition for rehearing Mr. Roach urged the appeals court to apply § 2000h as additional authority in support of his demand for a trial by jury, but rehearing was denied without opinion on July 23, 1997 (App. 40a and 42a).

The District Court's Comments in Other Proceedings

The district court's verdicts were dependent in large

measure upon its low assessment of the quality of the investigations of Officer Smith's complaints of sexual harassment by the fact-finding committees, by its belief that management officials in the Department lacked credibility, and by its approval of the findings and recommendations of the disinterested designee. These critical opinions, however, were held by the district judge far in advance of Mr. Roach's trial and were based upon proceedings in the *Neal* case, in which Mr. Roach was not party.[3] At a hearing which took place in *Neal* nearly two months before Mr. Roach's arraignment, the district judge made the following comments about Mr. Roach's case to the Department's counsel:

> THE COURT: Well, explain to me with those measures, why the District [of Columbia] could be in such a preposterous position as firing a woman [Dorothy Smith] who comes forward and claims sex harassment, and then the District decides to fire her for making that claim? How could the District get in such a posture? I understand the firing is rescinded, but if all these new procedures are so wonderful, how could the District have screwed that up so badly?

(*Neal*, 1/31/96 tr. 36, App. 54a). When the Department's counsel responded that Mr. Roach and Mr. Braxton had done nothing wrong, the judge shot back: "Exactly. That is your

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[3]Mr. Roach's only involvement in that litigation was to testify as a witness *for* the lead plaintiff, Bessye Neal, that she had been discriminated against by Mr. Roach's superiors in the Department.

problem. . . . Because you won't admit today they did anything wrong by firing a woman who only came forward and claimed sex harassment." (*Id.* at 36, App. 54a). Shortly thereafter, the district judge declared that "the fact-finding committees don't mean anything to me from this [the *Neal*] trial. You haven't cured anything about those." (*Id.* at 38, App. 56a). Later, he complained that the Department could not provide a satisfactory answer as to what happened to Officer Smith, and that there was "no indication" that changes the Department had made in investigating complaints of sexual harassment "were adequate in light of what happened to Dorothy Smith." (*Id.* at 39, App. at 57a).

Several times during the discussion the district judge asserted that Mr. Roach and Mr. Braxton were bound by the disinterested designee's recommendations, that she had determined that Officer Smith's allegations were not false, and that Officer Smith had made a "proper claim." (*Id.* at 38-40, App. 55a-58a). He added that the Department "can't answer how you can fire somebody for claiming sexual harassment," and he was "going to get Braxton and Roach in here and tell me how they think they can do it, but I sure don't understand it, and I haven't had D.C. explain to me how you can fire somebody for coming in and making a claim of sexual harassment." (*Id.* at 39-40, App. 57a). The court concluded the discussion with the following exchange:

> THE COURT: Then how can you say your procedures are effective? The deciding officials don't consult with the corporation counsel. They don't bother to follow the Court's injunction. They just blithely go along. And you want to say because everything is wonderful and you have cured

> everything. I don't see how anything is cured.
>
> MS. BURROUGHS: Your Honor, I'm simply trying to clarify for the Court the process at this point.
>
> THE COURT: Boy, you've clarified it.

(*Id.* at 41-42, App. 58a). From the judge's tone and his comments it was evident the he was predisposed to conclude that the fact-finding committees were incompetent, that the disinterested designee's findings and recommendations were appropriate, and that Officer Smith's allegations of harassment were true.

While the judgments in the *Neal* case were on appeal, the appeals court remanded that case to the district judge to give him an opportunity to explain why he had imposed the extremely harsh discovery sanction against the Department of precluding the presentation of fact witnesses, which had virtually ensured verdicts in favor of the plaintiffs. *Bonds v. District of Columbia*, 93 F.3d 801, 809-11 (D.C. Cir. 1996). In his statement of reasons filed in reply, the judge accused the Department and its counsel of "sheer arrogance," "blatant and widespread disrespect," "knowing misconstru[ction]" of the record, "ludicrous" and "dishonest" arguments, interrogatory answers "not compiled in good faith," and appellate briefs "so misleading as to be virtually dishonest." (*Bonds*, Supp. Brf. for the District of Columbia at 6 & n.4 (citations omitted), App. 59a). The appeals court found no evidence of bad faith, concluded that the Department's discovery violations were neither flagrant nor egregious, and ordered a new trial. *Bonds*, 93 F.3d at 812.

In an earlier hearing in the *Neal* case, the judge had accused Department officials of widespread perjury and announced his intention to prosecute such cases criminally, as either perjury or contempt, and not afford the defendants a jury trial: "[T]here is no jury trial in my court. I will determine the perjury matter. There is no right to a trial by jury . . .." (*Neal,* 6/7/94 tr. 3-4, App. 49a). A few months later, the judge stated that he would not consider fines for government officials who disobeyed his orders; rather, "I put government officials who disobey court orders in jail." (*Neal*, 12/16/94 tr. 382, App. 51a).

REASONS FOR GRANTING THE PETITION

I. DESPITE THE APPEARANCE OF PARTIALITY CREATED BY THE DISTRICT COURT'S COMMENTS, THE COURT BELOW DECLINED TO REQUIRE RECUSAL BY MISCONSTRUING THIS COURT'S DECISION IN *LITEKY v. UNITED STATES* AND THE RECUSAL STATUTES, THUS REACHING A DECISION IN CONFLICT WITH OTHER CIRCUITS.

In the district court, in a petition for writ of mandamus, and on appeal Mr. Roach asserted that under 28 U.S.C. §§ 144 and 455, the district court should have been disqualified from presiding at his trial. Relying on the following passage from this Court's decision in *Liteky v. United States*, 510 U.S. 540, 555 (1994), which involved the application of §§ 144 and 455, the appeals court concluded that disqualification was not required:

> [O]pinions formed by [a] judge on the basis of facts introduced or events occurring in the

> course of . . . current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Liteky*, 510 U.S. at 555.

United States v. Roach, 108 F.3d at 1484. The circuit court reasoned that because the district judge's comments were made after he had received Officer Smith's motion to show cause and the Department's reply to that motion, they were based upon those pleadings and thus were "rooted in the record." *Id.* Concluding that the district judge's conduct and questioning during trial did not demonstrate partiality which denied Mr. Roach a fair trial, the court refused to disqualify the judge. *Id.*

The appeals court's opinion contains no finding whether the district judge's pretrial comments demonstrated "an appearance of partiality." Instead, the opinion appears to require that defendants make a stronger showing, that of actual bias or partiality. The opinion also appears to insulate apparent partiality unless it is derived from an "extrajudicial source." These conclusions are at odds with the decision in *Liteky* and resulted in a misapplication of §§ 144 and 455.

Section 144 requires a judge to refer a timely filed motion for recusal to another judge when the motion alleges personal bias or prejudice against the moving party or in favor of an adverse party. 28 U.S.C. § 144. Section 455 requires disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned," including where he has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning

the proceeding." 28 U.S.C. § 455. The test for disqualification of a judge under these recusal statutes is an objective one: "[W]hat matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal . . . [is] required whenever 'impartiality might reasonably be questioned.'" *Liteky*, 510 U.S. at 555. A judge must be disqualified where there is "an appearance of partiality . . . even though no actual partiality exists." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). *See also, United States v. Microsoft Corp.*, 56 F.3d 1448, 1463-65 (D.C. Cir. 1995); *United States v. Antar*, 53 F.3d 568, 574 (3d Cir. 1995); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)("[I]f a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality' under the applicable standard, then the judge must recuse."). "Such a stringent rule," this Court has observed, "may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955)(citations omitted).

Here, the views of the district judge presented far more than "an appearance of partiality." His bias against Mr. Roach and the Department was real and substantial, and clearly entered into his assessment of the evidence presented at trial and the credibility of the witnesses, in particular, Mr.Roach. The judge's views demanded his disqualification regardless of the source of his beliefs. By declining to require the district court's recusal, the court below failed to properly apply 28 U.S.C. § 144 and 455.

Moreover, the appeals court's conclusion that the

district court's views were "deeply rooted in the record" of Mr. Roach's case cannot withstand scrutiny. Given the many derogatory comments the district court made about the Department and its management before the motion to show cause was filed on behalf of Dorothy Smith, it is obvious that the district court's pretrial declaration that the allegations contained in the show cause motion had merit, that he would not credit the fact-finding committees upon which Mr. Roach relied, and that the disinterested designee's findings and recommendations were correct, were opinions based upon the record in the *Neal* litigation, not the record in Mr. Roach's case. A judge's comments are deemed to be "extrajudicial" if they have "*some* basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (emphasis added). Clearly, the district court's views were predicated on what it had learned in proceedings other than the criminal contempt prosecution of Mr. Roach.

Even if the district court's views had been derived from proceedings involving only Mr. Roach, the court below's decision still misconstrues *Liteky* by allowing the source of the bias to virtually dictate the outcome of the recusal inquiry.

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. . . . Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the

> existence of a significant (and often determinative) "extrajudicial source" factor, than of an "extrajudicial source" doctrine, in recusal jurisprudence.

Liteky, 510 U.S. at 555. Contrary to the conclusion of the court below "[t]he extrajudicial source doctrine is not outcome determinative. The most critical factor is not the source of the judge's prejudicial knowledge or bias, but rather the judge's 'inability to render fair judgment.'" *In re Antar*, 71 F.3d 97, 102 (3d Cir. 1995) (quoting *Liteky*, 510 U.S. at 551).

The decision of the court below is in clear conflict with the application given *Liteky* by at least one other circuit. The Third Circuit has not hesitated to require recusal where, as here, a judge has indicated before trial a view of critical issues in the case. *See Haines v. Liggett Group Inc.*, 975 F.2d 81, 98 (3d Cir. 1992) (recusal required in case involving suit against tobacco industry for wrongful death where ultimate issue to be determined by jury was whether the tobacco industry concealed potential health hazards and judge questioned morality of industries' choosing profits over disclosing health risks); *United States v. Antar, supra*, 53 F.3d at 572-79 (failure to recuse plain error requiring reversal where, at sentencing, judge stated that his goal from the outset was to return to the public that which was taken from it as a result of fraudulent activities of defendant and others); *In re Antar, supra*, 71 F.3d at 102 (recusal required where judge had, on basis of opinions formed from previous related criminal case, predetermined defendant's scope of involvement in alleged fraud in civil suit). *See also, Southern Pacific Communications v. A.T.&T.*, 740 F.2d 980, 991 (D.C. Cir. 1984) ("Although it is both understood and accepted that judges do not approach a case empty-headed, it is also

presumed that a judge will not prejudge any case.").

In *In re Antar*, *supra*, a case remarkably similar to Mr. Roach's, a district court judge was disqualified from presiding in a civil securities fraud case where the defendant's son had earlier been tried criminally for charges arising out of the same securities activity, and the same judge had presided at that trial. The circuit court ordered recusal because in sentencing the son in the earlier case the judge had stated that the son "and others" had engaged in fraudulent activity, and at the father's trial the judge had remarked that the evidence from the earlier trial indicated that the father was not an "innocent bystander." Noting that the primary purpose of appellate review of a request for recusal is "to protect the public's confidence in the judiciary," and that the "inquiry focuses not on whether the judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias," the circuit court ordered required disqualification. 97 F.3d at 102.

To correct the lower court's misapplication of *Liteky* and the recusal statutes, to resolve the conflict with the Third Circuit, this Court should grant the petition for certiorari.

II. WHERE A STATUTE AUTHORIZES A TRIAL BY JURY AND THE DISTRICT COURT FAILS TO CONSIDER THAT STATUTE OR OTHERWISE ASSESS THE SERIOUSNESS WITH WHICH SOCIETY REGARDS THE OFFENSE THE COURT CANNOT DEPRIVE THE DEFENDANT OF THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL BY LIMITING THE PENALTY IT WILL IMPOSE.

The court below erred by relying on this Court's decision in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), to reject Mr. Roach's claim that the Sixth Amendment entitled him to a jury trial in the circumstances of this case, even though the district court had intentionally limited the potential penalty to six-months imprisonment as a means of denying Mr. Roach that right. *Roach*, 108 F.3d at 1484 (citing *Codispoti*, 418 U.S. at 511-12).

The Sixth Amendment to the United Sates Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." However, this jury trial right is a limited one; it does not ordinarily apply to "petty offenses." *Duncan v. Louisiana*, 391 U.S 145, 159 (1968). Whether an offense is petty for purposes of determining a defendant's constitutional right to a jury trial, depends on "objective indications of the seriousness with which society regards the offense." *Frank v. United States*, 395 U.S. 147, 148 (1969). In gauging the relative severity with which society views a given offense, a court is directed to "consider the maximum penalty attached to the offense." *Lewis v. United States*, 116 S.Ct. 2163, 2166 (1996). An offense carrying a prison term of six months or less is presumed petty; an offense with a maximum term of more than six months is a serious one, guaranteeing a defendant a trial by jury under the Sixth Amendment. *Id.* at 2166-67.

The maximum penalty is the the most significant measurement of the seriousness of a criminal offense because it most accurately "reveals the legislature's judgment about the offense's severity," *id.* at 2166, which in turn best reflects "the seriousness with which society regards the offense." *Frank*, 395 U.S. at 148. This Court has warned that "[t]he

judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task . . . ." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989). An offense which carries a maximum penalty of less than six months may nonetheless be considered a serious one, entitling a defendant to a jury trial, where "the legislature has authorized statutory penalties so severe as to indicate that the legislature considered the offense serious." *Lewis*, 116 S.Ct. at 2166-67.

Historically, the right to a jury trial has been considered a protection from not only the executive, but from the judiciary, as well. As the Court noted in *Duncan*:

> [t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

391 U.S. at 156. Thus, if a particular offense is deemed serious by the legislature, it becomes a jury demandable one, regardless of the trial judge's assessment.

However, when the legislature is silent as to its view of the severity of the offense, that is, when the legislature declines to establish a maximum penalty for the offense, "the pettiness or seriousness of the [offense] will be judged by the penalty actually imposed" by the sentencing judge. *Codispoti*, *supra*, 418 U.S. at 511 (defendants entitled to jury trial where trial court adjudged them guilty of seven counts of criminal contempt of court and sentenced them to penalty in excess of six months); *see also Taylor v. Hayes*, 418 U.S. 488 (1974) (defendant convicted of criminal contempt in a jurisdiction where the legislature had not specified a penalty not entitled to a jury trial, because the sentence actually imposed did not exceed six months). *Codispoti* emphasized, however, the "special concerns raised by the criminal contempt context," in determining when a jury trial is required in instances where the legislature has set no maximum penalty for an offense. *Lewis*, *supra*, 116 S.Ct. at 2168; *see also, Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (unique potential for judicial abuse in criminal contempt cases presents a "compelling argument for providing a right to a jury trial"). The conclusion to be drawn from *Codispoti* is that when the legislature does not specify a maximum penalty for an offense, an appellate court is to defer to the reasoned sentencing determination of a trial judge, who has considered the facts of the case and any authority that is relevant.

Congress afforded the right to a jury trial to defendants, such as Mr. Roach, charged with criminal contempt for violating court orders arising from civil rights litigation. Title 42, Section 2000h of the United States Code

provides, in pertinent part:

> In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months.

Though the existence of this statute was not known to the parties or the courts below until the time of the filing of Mr. Roach's petition for rehearing, it was in effect at the time of Mr. Roach's first appearance before the trial court, and Mr. Roach complied with its requirement when he demanded a trial by jury. The statute provides an absolutely clear statement of the gravity with which Congress views the charge of criminal contempt in the circumstances of this case and, therefore, an equally clear declaration of "the seriousness with which society regards the offense." *Frank*, *supra,* 395 U.S. at 148; *Blanton, supra*, 489 U.S. at 541. Had the district court not been predisposed to deny Mr. Roach his right to a jury trial and, instead, engaged in an unbiased assessment of whether a jury trial was required, it likely would have discovered the statute and afforded Mr. Roach his right to a trial by jury.[4]

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[4]Because of the belated discovery of 42 U.S.C. § 2000h, its significance in the calculus of whether Mr. Roach had a Sixth Amendment right to a jury trial was not argued to the court below. However, after discovery of the statute, Mr. Roach argued in his petition for rehearing that the existence of the

Although *Codispoti* and other decisions of this Court may be read to stand for the proposition that a trial court may deprive a defendant of a jury trial by limiting the penalty to six-months imprisonment in the absence of the legislature or society's intent to the contrary, a trial judge is not empowered to make a serious case a petty one simply by so limiting his sentence. If a case is serious, it must be tried by a jury, regardless of the trial judge's limitation of the penalty. *Blanton*, 489 U.S. at 541-42. Thus, the argument that because the judge arbitrarily fixed Mr. Roach's potential period of incarceration at no more than six months, the alleged offense necessarily became petty, puts the cart before the horse. It is society's judgment of the alleged misconduct, not simply the sentence itself, that properly differentiates between a petty and a serious offense. The trial court was in no position to deny Mr. Roach the valued right to a trial by jury by deciding, without any reasoned basis, that the offense would be punishable by no more than six months imprisonment.[5] By sustaining the district court's action, the

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statute when he made his demand for a jury trial entitled him to a trial by jury. In its response to the petition, the government argued that Fed. R. App. P. 28(j) and D.C. Cir. R. App. P. 28(g) barred consideration of the statute because it was "new authority." Thereafter, the circuit court denied the petition for rehearing without opinion. (App. 40a, 42a).

[5]Even without knowing of the existence of 42 U.S.C. § 2000h, had the court engaged in the required analysis, it could not have deemed this charge "petty" as to Mr. Roach. The conviction and sentence place Mr. Roach, who has "enjoyed an otherwise exemplary career" at the Department, *Roach*, 108 F.3d at 1485, the last years of which were spent

court below misconstrued *Codispoti* and other decisions of this Court addressing the the right to a jury trial. The affirmance "changes the nature of the six-month rule from a reasonable effort to distinguish between 'serious' and 'petty' contempts into an arbitrary barrier behind which judges who wish to protect their summary contempt convictions without exposing their charges to the harsh light of a jury may safely hide." *Taylor*, 418 U.S at 505 (Marshall, J., dissenting). This Court should grant the petition for certiorari in order to rectify this misunderstanding of this Court's precedents which has resulted in the arbitrary deprivation of Mr. Roach's fundamental constitutional right to a jury trial.

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as the warden of the institution housing the District of Columbia's most violent criminals, in real danger, should the district court again decide to incarcerate him. The conviction also subjects him to loss of his employment and the benefits he has earned during his years of public service. *See generally*, D.C. Personnel Regs., Part I, Chap. 16. Already, his conviction has resulted in widespread adverse publicity for him. *See, e.g., Warden at Lorton, Former Boss Jailed. Judge Finds 2 Retaliated Against Complainant*, WASH. POST, Oct. 9, 1996, at 1. Perhaps most significantly, after more than a quarter of a century of public service and a well deserved and unblemished reputation for fairness, honesty, and commitment to the well being of women, he has now been branded by the district court as a liar, a criminal, and an harasser of women. No reasonable person could deem these consequences "petty."

III. BY NOT AFFORDING MR. ROACH THE BENEFIT OF 42 U.S.C. § 2000H, THE COURT BELOW FAILED TO FOLLOW THE PRINCIPLE OF *ELDER v. HOLLOWAY*, THAT REQUIRES AN APPELLATE COURT TO APPLY THE LAW IN EFFECT AT THE TIME OF ITS DECISION.

The question of whether Mr. Roach was entitled to a jury trial is a question of law and, as such, is to be reviewed *de novo*. *See United States v. Brown*, 71 F.3d 845 (11th Cir. 1996); *Elder v. Holloway*, 510 U.S. 510, 516, (1994) (citation omitted) (questions of law to be reviewed *de novo* on appeal). In *Elder* this Court stated clearly that in reviewing questions of law, a court of appeals should "use its 'full knowledge of its own [and other relevant] precedents." *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 192, n.9 (1984)).

As noted, when Mr. Roach made his demand for a jury trial at his initial appearance before the district court, the law in effect -- 42 U.S.C. § 2000h -- clearly established his entitlement to a jury trial. *See*, *United States v. Kozel*, 908 F.2d 205, 207 (7th Cir. 1990) ("42 U.S.C. §§ 1995 and 2000h . . . explicitly create entitlements to a jury trial for various kinds of criminal contempt"); Fed. R. Crim. P. 42(b)("[t]he defendant is entitled to a jury trial in any case for which an act of congress so provides").

Mr. Roach continued to pursue the issue of his entitlement to a jury trial throughout the appellate process, but the request was again denied. Immediately upon discovery of section 2000h, Mr. Roach brought this "pertinent and

significant"[6] authority to the court's attention in his petition for rehearing, but the court of appeals, without explantion, denied the petition (App. 40a, 42a). In doing so, the court of appeals erred by ignoring the clear mandate of *Elder*, that a court of appeals is not limited to consideration of only those authorities cited by the parties.[7]

In reviewing Mr. Roach's jury demand, the appeals court was obligated, in its *de novo* review of the issue, to conduct an independent review of the lower court's ruling and correct any legal errors.[8] *Salve Regina College v. Russell*, 499 U.S. 225,

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[6]Fed. R. App. P. 28(j).

[7]Although *Elder* addressed the issue of what authorities could be considered in the scope of determining whether a right was "clearly established" for the purposes of presenting a qualified immunity defense, the principle announced need not be limited to such cases. *See e.g., United States v. Lanier*, 117 S.Ct. 1219, 1226-1228 (1997) (in context of determining liability under 18 U.S.C. § 242 a court should not look solely to the decisions of the United States Supreme Court to determine if "prior judicial decisions gave fair warning that . . . actions violated constitutional rights", but may in fact look to all relevant authority); *United States v. Martin*, 109 F.3d 1177, 1178 (7th Cir. 1996) (per curiam) (citing, in general, *Elder*, 510 U.S. 510) (in reviewing appellant's sentence under the United States Sentencing Guidelines, court would not disregard case not cited by prosecution because "a court is not restricted to the cases the parties discuss").

[8]An analagous situation arises when an appellate court affirms a lower court's ruling which, although correct, is based on an erroneous reason. *J.E. Riley Investment Co. v.*

231-32 (1991); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984). "[T]here is no question that the district court must divine and apply the law correctly, *no matter what cases are cited by the parties.* The court of appeals has a correlative obligation to correct error when it occurs. *Elder v. Holloway*, 975 F.2d 1388, 1394 (9th Cir. 1992) (emphasis added), *rev'd*, 510 U.S. 510 (1994).

The fact that Mr. Roach did not bring § 2000h to the court's attention until filing the petition for rehearing does not abrogate the appeals court's duty to independently review and apply the law in effect at the time the jury demand was initially made and pursued on appeal.

> [C]ourts of appeals are vested with plenary appellate authority over final decisions of district courts. . . . The obligation of responsible appellate jurisdiction implies the requisite authority to review independently review a lower court's determinations. *Salve Regina*, 499 U.S. at 231 (citation omitted).

Furthermore, once a litigant raises a claim before the lower court, he or she is allowed to formulate and pursue any argument in support of that claim on appeal. *Yee v. City of Escondido California*, 503 U.S. 519, 533 (1992). *Cf. Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) (citation omitted) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the

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Commissioner of Internal Revenue, 311 U.S. 55, 59 (1940) (citation omitted).

independent power to identify and apply the proper construction of governing law"); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("[N]ot all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research . . .").

The court below has implicitly recognized these principles by recently applying statutory authority raised for the first time by an appellant on appeal. *See United States v. Idowu*, 105 F.3d 728, 730 (D.C. Cir. 1997)(considering on appeal for the first time a statute not mentioned to district court in relation to its possible application as a defense to the offense with which appellant had been convicted). The court of appeals therefore ignored its own relevant precedent by not considering the effect of § 2000h on Mr. Roach's demand for a jury trial and effectively denied Mr. Roach the ability to present an alternative theory to the court. Moreover, by refusing to consider and apply § 2000h, the court of appeals ignored the main purpose of a petition for rehearing, *i.e.* to direct a court's attention to some material matter of law which was overlooked." *See e.g., National Labor Relations Board v. Brown & Root*, 206 F.2d 73, 74 (8th Cir. 1953).

Mr. Roach met the statutory requirement to obtain a jury trial under § 2000h by demanding a jury trial at his first appearance before the district court, despite the fact that the statute was unknown to him at the time. He vigorously maintained his demand for a trial by jury both at the trial and appellate levels. By ignoring Mr. Roach's compliance with the statute and denying him the right to a jury trial, the appellate court failed in its obligations to conduct an independent review of the issue and use its "full knowledge

of its own [and other relevant] precedents." *Elder*, 510 U.S. at 516 (citation omitted).

> Punishing [a] party so severely for its failure to exhaust all potentially relevant authority, may well help district court judges get rid of cases, . . . but it is hardly fair. Determining the law is, after all, a shared responsibility to be borne by the court and the litigants. Where the [court] misses a key precedent and therefore renders an erroneous ruling, the consequences of that error should not be visited entirely on one of the parties. *Elder v. Holloway*, 984 F.2d 991, 999 (9th Cir. 1983) (Kozinski, J., dissenting from denial of rehearing en banc).

Consideration of the statute was not barred by either Fed. R. App. P. 28(j) and the corresponding Circuit Rule 28(g). Both rules allow for the presentation of pertinent and significant authority which comes to a party's attention after oral argument but before decision. In this case, Mr. Roach did not learn of, and thus could not present, the relevant authority until after the decision of the panel had been rendered. However, because the time for filing and consideration of the petition for rehearing had not expired, the decision was not final and the court was still empowered to apply the statute.

Although Fed. R. App. P. 28(j) and Circuit Rule 28(g) present some limitations on a party's ability to present new authority, the rules are relaxed when subjects of public importance are involved or in situations where application of the rule would exact an unduly harsh result. *See Consumers*

Union of United States v. Federal Power Comm'n, 510 F.2d 656 (D.C. Cir. 1974) (court considered exhibits not originally presented in briefs because matter involved was one of "substantial public interest"); *Platis v. United States*, 409 F.2d 1009 (10th Cir. 1969) (damage award involved public monies and was, therefore, a matter of public interest); *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970) (court considered issue "passed on in brief" and presented below" because it would be "unduly harsh" in this situation to deem claim abandoned).[9]

Mr. Roach's case meets both these exceptions. It raises an issue of public importance: the right to a jury trial. And it presents a situation where rigid adherence to the rules in this case would produce an unduly harsh result. Two other

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[9]A court has "discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments." *Kamen*, 500 U.S. at 100 n.5 (citation omitted). However, as the Court noted in *Kamen* "if a court undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law, the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on this issue decided." *Id.* The court of appeals failed to give any explantion for its decision to deny Mr. Roach's petition for rehearing. The court was presented with an effectively raised claim to the right to a jury trial. Although its decision to deny rehearing does not establish binding precedent, it clearly may have been based upon a truncated body of law and does not give guidance or clarification to future litigants.

employees of the Department convicted of criminal contempt by the same district, who were arraigned on contempt charges the same day as Mr. Roach and joined his demand for a jury trial have claimed in their appeals that § 2000h entitled them to a jury trial.[10] It would indeed be "anomalous to reverse some convictions but not others when all defendants suffer from the same error." *United States v. Gray*, 626 F.2d 494, 497 (5th Cir.), *cert. denied*, 449 U.S. 1038, 449 U.S. 1091, and 450 U.S. 919 (1980).[11] The government will have addressed the application of § 2000h to those appellants and would not, therefore, be prejudiced by

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[10]*United States v. Anthony J. Rapone & Carlitta Robinson*, Misc. No. 96-22 (D.D.C. 1995), *appeal argued and submitted*, No. 96-3156 (D.C. Cir. Oct. 16, 1996). Their cases proceeded to trial after Mr. Roach's simply due to the schedules of their attorneys, and they learned of the existence of § 2000h from counsel for Mr. Roach shortly before Mr. Roach's petition for rehearing was filed, which was before their appellate briefs were due.

[11]In *Gray*, the court was presented, *inter alia*, with the question as to whether it should allow co-defendants to adopt contentions made in their respective briefs when only one co-defendant had complied with the mandates of Federal Rule of Appellate Procedure 28(i) and the remainder adopted the arguments at oral argument. The court noted its "discretion to suspend the Federal Rules of Appellate Procedure 'for good cause shown.'" *Gray*, 626 F.2d at 497 (citing Fed. R. App. P. 2). Deciding to consider the arguments to be adopted, *id*, the court noted there was no prejudice to the government which "had the opportunity to fully brief all issues in response to the various contentions of the defendants." *Id.*

its application to Mr. Roach.

Furthermore, most of the reasons which normally militate against receipt of belatedly submitted authority are not present. The petition did not present the court of appeals with an entirely new issue to consider; Mr. Roach had maintained his entitlement to a jury trial from the moment he entered the courtroom to address the contempt charge. There is absolutely no evidence in the record that Mr. Roach withheld the authority for tactical advantage. Nor would there be any strategic reason for him to do so, given his position from the commencement of the litigation that he was entitled to a jury trial. Thus there was no significant reason for the appeals court to decline to apply § 2000h.

This Court should grant the petition for certiorari in order to require the court below to apply 42 U.S.C. § 2000h and to make clear to other federal courts that *Elder* requires that they apply governing legal authority when it is brought to their attention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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October 21, 1997

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APPENDIX A
[108 F.3d 1477 (D.C. Cir. 1997)]

UNITED STATES of America, Appellee

v.

David ROACH, Appellant.

Nos. 96-3119, 96-3120.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 3, 1997

Decided April 1, 1997.

[p. 1479]

Appeals from the United States District Court for the District of Columbia (No. 96ms00020).

Gerald I. Fisher, Washington, DC, argued the cause and filed the briefs for appellant David Roach.

Thomas Abbenante, Washington, DC, argued the cause for appellant Bernard Braxton. With him on the briefs was Mary E. Davis, Washington, DC.

William D. Braun, Trial Attorney, U.S. Department of Justice, Washington, DC, argued the cause and filed the brief for

appellee.

Before: EDWARDS, Chief Judge, WALD and TATEL, Circuit Judges.

Opinion of the Court filed by Circuit Judge Tatel.

TATEL, Circuit Judge:

Two senior officials of the District of Columbia Department of Corrections appeal their criminal contempt convictions for violating a district court order prohibiting retaliation against Department employees who complain of sexual harassment. Finding sufficient evidence that appellant David Roach violated the court order by firing Officer Dorothy Smith after she complained of harassment, and neither procedural nor constitutional error, we affirm his conviction. However, because the district judge sentenced Roach to 180 days in prison--the maximum permissible term--without adequately considering relevant sentencing factors, we remand for resentencing. We reverse appellant Bernard Braxton's conviction because the record does not support the district judge's finding that Braxton's recommendation of disciplinary proceedings against Smith was retaliatory.

I

After a jury in *Neal v. Director, District of Columbia Dep't of Corrections*, Civ. A. No. 93-2420, 1995 WL 517244 (D.D.C. Aug. 9, 1995), found that the Department of Corrections had engaged in widespread sexual harassment and retaliation against female corrections officers in violation of Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994), the district court permanently enjoined Department employees from committing further acts of harassment or retaliation. Copies of the court's order were distributed in August 1995 to Department officials, including Roach, then Warden of the Department's Maximum Security Facility, and Braxton, then Deputy Director for Institutions. Roach and Braxton each signed acknowledgments that they had received and read the order.

In April 1995, while the *Neal* litigation was pending, Dorothy Smith, a corrections officer at the Maximum Security Facility, lodged a sexual harassment complaint against fellow officer Mark Nutter. Smith claimed that Nutter, with whom she had had a personal relationship, was making unsolicited sexual advances and had, on one occasion, followed her into a bathroom. A fact-finding committee of three Department employees specially trained to investigate claims of sexual harassment found insufficient evidence to support Smith's allegations, but recommended that both Smith and Nutter receive counseling.

A month later, Smith again complained about Nutter. Recalling an earlier incident, Smith claimed that Nutter, summoning her to the prison showers, pulled her in front of a nude inmate, Maurice Murray, and made a rude comment about Murray's appearance. Reporting the incident to her supervisor, Smith wrote that "Nutter's action was both humiliating and disrespectful to inmate Murray and myself." Braxton's assistant, Patricia Johnson, selected a two-member committee to investigate the claim, which Braxton **[p. 1480]** approved. Believing that Smith alleged that Nutter had engaged in sexual misconduct against an inmate--not that he had sexually harassed Smith--Johnson chose not to select the committee members from

the roster of officials trained to handle cases involving sexual harassment of employees.

Having initially confirmed Smith's account of the shower incident to her supervisor, inmate Murray recanted before the committee, claiming that the confrontation with Nutter never happened. After hearing from Smith, Nutter, and Murray, the fact-finding committee found insufficient evidence to support Smith's complaint. Concluding that Smith's allegation "stem[med] from [her] failure to make a valid case of sexual harassment against Officer Nutter," the committee recommended that Smith be disciplined because she had now "forwarded two unsupported and unfounded sexual harassment complaints."

Braxton sent the committee's report to Roach, directing him to initiate disciplinary action against Smith. Pursuant to Department regulations requiring that a separate "proposing official" determine what discipline--ranging from temporary suspension to removal--Smith should receive, Harold Nelson, an acting Deputy Warden, signed a memorandum recommending that Smith be fired for her "blatant efforts to malign the character [and] creditability [sic] of Officer Mark Nutter."

Facing discharge and exercising her rights under Department regulations, Smith requested the appointment of a "disinterested designee" to investigate the Department's charge that she had fabricated her claims against Nutter. After reviewing the reports of the two fact-finding committees and affidavits from corrections officers and inmates supplied by Smith's lawyer, the disinterested designee reported to Roach that she "was unable to draw the same firm conclusion as did the [second committee] that Officer Smith's allegation of sexual misconduct was lodged against Officer Nutter in retaliation" for the failure of her earlier complaint, and that Smith should

accordingly not be terminated.

Roach rejected the designee's report, instead adopting the recommendation, purportedly written by Nelson, that Smith be fired. On September 12, 1995, two weeks after acknowledging that he had received and read a copy of the court order in *Neal*, Roach discharged Smith for "inexcusable neglect of duty." In a memorandum to the personnel office, Roach wrote that "Officer Smith's actions clearly demonstrate that her filing of a second sexual harassment charge against her former personal companion was retaliatory in nature and designed to injure Officer Nutter's creditability [sic] and character within the . . . Department."

Smith appealed her termination to Braxton. After reviewing the affidavits supplied by Smith's lawyer and the disinterested designee's recommendation, Braxton reversed Roach's decision, ordering Smith reinstated with back pay on October 11, 1995.

While her disciplinary case was pending before Roach, Smith reported to her supervisor that another officer, Michael Konyn, had told two inmates that she would be "fired in thirty days" and that all she did on the job was "walk the tiers, cut down strings, and shake her big butt." Interpreting Smith's complaint as one of sexual harassment, her supervisor forwarded a report to Braxton, who in turn requested that a third fact-finding committee investigate. The committee interviewed Officer Konyn, who denied having made any statements about Smith, and the two inmates, each of whom testified that Konyn had said Smith would be fired. The committee never asked the inmates whether Konyn had made the "big butt" comment. Finding "no probable cause to sustain the complainant's allegation of Sexual Harassment," the committee's report

recommended that Smith "receive corrective and or/adverse [sic] actions for providing misleading and inacurate [sic] information," and that Konyn "receive counseling relative to Inmate/Staff relationships." Concurring with the committee's recommendations, Braxton directed Roach on October 16, 1995, to initiate disciplinary proceedings against Smith once again.

In November 1995, plaintiffs in *Neal* moved the district court to order Roach and **[p. 1481]** Braxton to show cause why they should not be held in criminal contempt for taking disciplinary action against Smith. After its own investigation, the Government recommended prosecution. Denying defense motions for recusal and for a jury trial, the district judge presiding over the *Neal* case conducted a four-day trial of the contempt charges.

Rejecting Roach's defense that he had fired Smith for fabricating the incident involving inmate Murray, the district judge found that "it really didn't matter to Mr. Roach whether the committee only found no probable cause or whether they found Officer Smith made a false claim." According to the judge, the "real reason for [Roach's] action was retaliation against Officer Smith for making [her second] sexual harassment claim." Finding the third committee report "equally flawed," the judge determined that Braxton's decision to initiate a second disciplinary action against Smith was also retaliatory. Based on these findings, the district court convicted Roach and Braxton of criminal contempt for violating the August 9 order. Without further hearing, the court sentenced both Roach and Braxton to 180 days in prison.

Having granted appellants' motions to stay execution of sentence, we now consider their appeals. Both argue that the evidence presented at trial is insufficient to support their

convictions. Roach further contends that the district judge erred by not first considering civil contempt proceedings, and by denying motions to recuse himself and for a jury trial. Both Roach and Braxton argue that their six-month sentences are excessive and should be reduced. We consider each argument in turn.

II

[1-3] The district court convicted appellants under 18 U.S.C. § 401, which permits the court "to punish by fine or imprisonment, at its discretion, such contempt of its authority . . . as [d]isobedience or resistance to its lawful . . . order." 18 U.S.C. § 401(3) (1994). To convict a defendant of criminal contempt under this statute, the district court must find, beyond a reasonable doubt, that the defendant willfully violated a "clear and reasonably specific" order of the court. *United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C.Cir.1993); *United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir.1987). For a violation to be "willful," the defendant must have acted with deliberate or reckless disregard of the obligations created by the court order. *In re Holloway*, 995 F.2d 1080, 1082 (D.C.Cir.1993); *see also United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974) (willful violation is volitional act that contemnor knew or should have known was wrongful).

[4] Reviewing contempt convictions for sufficiency of the evidence, we view the facts in the light most favorable to the Government, *United States v. Johnson*, 952 F.2d 1407, 1409 (D.C.Cir.1992), and apply "the familiar standard for any criminal conviction," asking whether "'a fair-minded and reasonable trier of fact [could] accept the evidence as probative of [the] defendant's guilt beyond a reasonable doubt.'" *In re Holloway*,

995 F.2d at 1082 (quoting *In re Joyce*, 506 F.2d 373, 376 (5th Cir.1975)). Applying this standard, we find sufficient evidence to sustain Roach's conviction.

The district court's order is clear and specific, prohibiting Department employees from "taking or threatening to take adverse employment action against a person because he or she had engaged in legally protected activity." *Neal*, 1995 WL 517244 at *13. The order defines "legally protected activity" as, among other things, "making oral or written complaints about sexual harassment . . . regardless of whether the conduct of which the employee complained was actually proved to have constituted [such] harassment." *Id.* Although we agree with Roach that the court order does not prohibit the Department from disciplining those who intentionally file false claims, *see Women Prisoners v. District of Columbia*, 93 F.3d 910, 931 (D.C.Cir.1996), the evidence at trial permitted the district court to conclude beyond a reasonable doubt that Roach fired Smith because she failed to persuade the fact-finding committees of her claims, not because her allegations were demonstrably false.

[p. 1482] From the evidence, the district court could reasonably find that Roach had an inadequate basis upon which to discipline Smith for making a false claim. The second fact-finding committee failed to question inmate Murray or Smith's supervisor about Murray's original statement that Officer Nutter had, in fact, accosted him in the shower and made rude remarks about the inmate's appearance. Offering no basis for its finding that Smith's complaint "stem[med] from [her] failure to make a valid case of sexual harassment" against Officer Nutter, the committee recommended disciplining Smith because she had filed "two unsupported and unfounded sexual harassment complaints," even though it had not investigated her earlier claims and those claims had not been found false or

"unfounded," but only unproven, by the first fact-finding committee. Gov. Ex.1 (Fact-Finding Committee Report, July 13, 1995).

The court could also reasonably find that Roach did not, as he argues here, negligently rely on a flawed committee recommendation, but instead intentionally retaliated against Smith for lodging an unsuccessful complaint. Consistent with an earlier declaration, Nutter testified that Roach told him before the second committee conducted its investigation that if he were found "not guilty," he "wouldn't have to worry" about being charged by Smith "from that institution any more." Tr. 9/30/96 at 65-66; Gov. Ex. 31 (Decl. of Mark Nutter). Harold Nelson, the official who purportedly acted as the "proposing official" in Smith's case, testified that in fact Roach wrote the memorandum recommending Smith's discharge, and asked Nelson to sign it. Tr. 9/30/96 at 81-88, even though Department regulations prohibited Roach from doing so, D.C. Pers. Regs. § 1609.11 (proposing official shall not be deciding official); Tr. 10/3/96 at 56 (proposing official normally deputy warden). Although the court order defines protected activity as "making oral or written complaints about sexual harassment . . . regardless of whether the conduct of which the employee complained was actually proved to have constituted [such] harassment," *Neal*, 1995 WL 517244, at *13, Roach explained to Nelson "that the reason he was recommending [Smith's] termination was due to this being the second complaint in which the fact-finding committee found no probable cause." Gov. Ex. 30 (Decl. of Harold Nelson). Implementing his own recommendation that Smith be discharged, Roach then ignored affidavits from officers and inmates supporting Smith's claims of harassment, as well as the disinterested designee's report. In reaction to the disinterested designee's conclusion that Smith not be fired, Roach wrote in the margin of the designee's report--echoing his earlier

statement to Nelson--"why not . . . she has not proved either claim of sexual harassment and admits to a previous personal relationship with Nutter. Gov. Ex. 29 at 4 (Mem. from Regina Gilmore to David Roach, Aug. 30, 1995).

Taken as a whole, this evidence supports the court's finding that Roach fired Smith simply because she failed to prove her allegations of sexual harassment against Nutter--an act of retaliation clearly prohibited by the court's August 9 order. Because Roach had acknowledged receiving and reviewing the court order two weeks before terminating Smith, the court could further conclude that Roach acted with deliberate or reckless disregard of the obligations imposed by the order.

[5] Evaluating the evidence against Braxton, we reach a different conclusion. The district court held Braxton in contempt for affirming the third fact-finding committee's recommendation that Smith be disciplined for providing the committee with misleading and inaccurate information. Like Roach, Braxton argues that while he may have erred in relying on the third committee report, there is insufficient evidence that he initiated discipline against Smith because she complained of harassment--and not because she purportedly gave false information to the committee. In Braxton's case, we agree.

The district court began by finding that the third committee's investigation and report were "equally flawed," This finding is fully supported by the record. After two inmates corroborated Smith's claim that Officer Konyn had said that Smith would soon be fired, they were not asked whether Konyn **[p. 1483]** also made disparaging comments about Smith's appearance, the very reason a sexual harassment committee was investigating Smith's complaint. Moreover, although Konyn denied having made any statements to the inmates about Smith,

the committee reported without explanation that it was Smith, not Konyn, who had provided false information. Gov. Ex. 2 (Fact-Finding Committee Report, Oct. 5, 1995).

We think more evidence is required, however, to sustain the district court's further determination that Braxton, like Roach, intended to discipline Smith simply because she filed an unsuccessful claim of harassment and, therefore, that his initiation of discipline violated the court order. The court appears to have inferred such a retaliatory intent from its finding that Braxton had earlier treated Smith's second complaint against Officer Nutter as an allegation of sexual misconduct against inmate Murray, instead of sexual harassment, so that consistent with Department regulations he could select the members of the second fact-finding committee himself rather than appointing them from a list of specially-trained employees. Viewing the evidence with the deference owed the district court as factfinder, we think this finding--that Braxton "jerry-rigged" the committee--is unsupported in the record. Tr. 10/8/96 at 16. According to Patricia Johnson's unrebutted testimony, she, not Braxton, selected the committee's members. Tr. 10/2/96 at 127. Moreover, although failing to refer the complaint to a special sexual harassment committee may have been a mistake, Smith herself had suggested through her supervisor that the incident could be construed as sexual misconduct against an inmate, Gov. Ex. 1 (Mem. from Steve Smith to Bernard Braxton, May 25, 1995), a suggestion in which Johnson concurred, Tr. 10/2/96 at 138-40. Braxton's approval of Johnson's decisions, without other evidence probative of his intent, falls short of establishing that Braxton improperly manipulated the investigation of Smith's second complaint.

Absent this finding, we do not see in the record a basis upon which the district court could have concluded beyond a

reasonable doubt that Braxton's initiation of new disciplinary proceedings against Smith was retaliation for her failure to prove her claim to the third committee, particularly given his decision, not one week earlier, ordering Smith's reinstatement. Because disciplining an employee for making false statements, even if negligent, does not violate the court order, we reverse Braxton's conviction.

III

We next turn to the remaining grounds upon which Roach challenges his conviction. Each merits but little discussion.

[6-8] Roach claims that the district court erred by initiating criminal contempt proceedings without first considering civil sanctions. We disagree. Although courts must adhere to "the principle that 'only [t]he least possible power adequate to the end proposed' should be used in contempt cases," *Young v. United States ex rel. Vuitton & Fils* S.A., 481 U.S. 787, 801, 107 S.Ct. 2124, 2134, 95 L.Ed.2d 740 (1987) (quoting *United States v. Wilson*, 421 U.S. 309, 319, 95 S.Ct. 1802, 1808, 44 L.Ed.2d 186 (1975)), that principle does not require courts to consider civil contempt in every case. When a court seeks to punish willful disobedience of an order, and not to coerce future conduct, criminal contempt proceedings may be appropriate without prior consideration of civil sanctions. *See NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1418 (9th Cir.1994); *United States v. Armstrong*, 781 F.2d 700, 702-06 (9th Cir. 1986). Presented with evidence of willful violation of its order and having earlier announced to the Department its intention to hold violators criminally liable, the district court's initiation of criminal contempt proceedings against Roach was within its discretion.

[9] Alleging judicial bias, Roach argues that the district judge, having presided over the *Neal* litigation, should have recused himself from Roach's case, and that the judge's failure to do so denied Roach his constitutional right to a fair and impartial trial. Reviewing the district judge's denial of Roach's recusal motion for abuse of discretion, *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C.Cir.1992), and Roach's constitutional **[p. 1484]** challenge *de novo, see United States v. Donato*, 99 F.3d 426, 435 (D.C.Cir.1996), we reject both arguments.

[10] Although Roach points to comments by the district judge indicating the judge believed the case against Roach was strong, "opinions formed by [a] judge on the basis of facts introduced or events occurring in the course of . . . current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). Because at the time the district judge made the remarks he had already reviewed Smith's motion to show cause why Roach should not be held in criminal contempt as well as the Department's opposition, he was quite familiar with the allegations and documentary evidence in Roach's case. In a controversial, sharply contested case presided over by an experienced district judge, strongly stated judicial views rooted in the record should not be confused with judicial bias. Reviewing the judge's remarks ourselves, we do not find a level of bias or hostility that, when brought to the attention of the district judge, required his recusal. Moreover, we find nothing improper in the judge's interrogation of witnesses and reactions to the evidence during trial, particularly because the court was sitting without a jury. In any event, the judge's comments reflect neither such partiality nor such antagonism as to make us doubt that Roach received a fair trial. *Cf. Donato*, 99 F.3d at

435-38.

[11] Finally, Roach's argument that he was denied a jury trial in violation of the Sixth Amendment is without merit. "[C]riminal contempt is a petty offense unless the punishment makes it a serious one." *Bloom v. Illinois*, 391 U.S. 194, 198, 88 S.Ct. 1477, 1479, 20 L.Ed.2d 522 (1968). Because the district court announced at the outset that it would not impose a sentence of imprisonment in excess of six months, and since Roach's sentence did not in fact exceed that amount, Roach's offense was petty and he had no right to a jury trial. *See Codispoti v. Pennsylvania*, 418 U.S. 506, 511-12, 94 S.Ct. 2687, 2690-91, 41 L.Ed.2d 912 (1974); *Cheff v. Schnackenberg*, 384 U.S. 373, 379-80, 86 S.Ct. 1523, 1525-26, 16 L.Ed.2d 629 (1966)

IV

[12-16] Although we affirm Roach's conviction, we cannot affirm his sentence. "[W]here Congress has not seen fit to impose limitations on the sentencing power for contempt[,] the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection." *Green v. United States*, 356 U.S. 165, 188, 78 S.Ct. 632, 645, 2 L.Ed.2d 672 (1958). In determining an appropriate sentence for criminal contempt, district courts must consider "the necessity of achieving compliance with the court's order, the gravity of the offense, [and] the importance of deterring such acts in the future.'" *In re Holloway*, 995 F.2d at 1088 (quoting *Drivers Chauffeurs & Helpers Local No. 639 v. Penello*, 420 F.2d 632, 634 (D.C.Cir.1969)). "Because of the nature of these standards," we must place "great reliance . . . [on] the discretion of the trial judge." *United States v. United Mine Workers*, 330 U.S. 258, 303, 67 S.Ct. 677, 701, 91 L.Ed.

884 (1947). Deference to the district court's consideration of relevant sentencing factors, however, does not lessen the importance of appellate review for we too have "a special responsibility for determining that the [contempt] power is not abused." *Green*, 356 U.S. at 188, 78 S.Ct. at 645.

The district court sentenced Roach to 180 days imprisonment, the maximum sentence it could impose without a jury conviction. Although the district judge mentioned "the seriousness of the offense[]" and"the . . . need to deter similar misconduct," Tr. 10/8/96 at 20, he offered no reason why these sentenc- **[p. 1485]**ing factors justified the maximum prison term, and he failed to consider the third factor--whether such a sentence was necessary to achieve compliance with the court's order. In light of the "responsibility and circumspection," *Green*, 356 U.S. at 188, 78 S.Ct. at 645, required of the district court when sentencing for contempt, and our need to rely, in the absence of statutory guidance, on the court's evaluation of relevant sentencing factors, *United Mine Workers*, 330 U.S. at 303, 67 S.Ct. at 701, we must conclude on this record that the district court abused its discretion by giving Roach the maximum sentence.

Although having the power to revise Roach's sentence ourselves, *In re Holloway*, 995 F.2d at 1987-88, we instead remand his case to the district court for resentencing. *See Green*, 356 U.S. at 188, 78 S.Ct. at 645 (reviewing court may modify sentence or remand for reconsideration). We think the district judge who tried Roach's case, having enforced the court's orders in *Neal* for some time, occupies the best position to fashion a sentence that both vindicates the court's authority and reflects the degree of Roach's individual and culpability for the Department's behavior. On remand, the district court should consider evidence, earlier credited by it, that Roach has a strong

employment record and has been a supporter of the Department's female officers, including testifying on their behalf in the *Neal* case. In addition to the court's finding that Roach has been mistreated by his superiors since testifying in *Neal*, this evidence is relevant to the importance of specific deterrence in his case. Moreover, because "the seriousness of the consequences of the contumacious behavior" is also a relevant sentencing factor, *United Mine Workers*, 330 U.S. at 303, 67 S.Ct. at 701, the court should consider that Braxton reversed Officer Smith's discharge within a month and reinstated her with back pay. Although certainly not exonerating his contemptible act, evidence that Roach's single violation of the court order resulted in no irreparable harm, and that Roach has enjoyed an otherwise exemplary career at the Department, suggests to us that a substantial prison term would be inappropriate. *Cf. In re Martin*, 70 F.3d 638 (D.C.Cir.1995) (unpublished disposition) affirming conviction of defendant sentenced to 10 days imprisonment for *Neal* order violation).

We affirm Roach's conviction, reverse Braxton's conviction, vacate Roach's sentence, and remand to the district court for resentencing.

So ordered.

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	
DAVID ROACH	)	Misc. Action No. 96-20
	)	(RCL)
	)	
Criminal Contempt of Court	)	

ORDER

This case came before the court on September 30 through October 4, 1996 for hearing on an order to show cause why David Roach should not be held in criminal contempt of court. Roach was accused of retaliation, in direct violation of this court's order dated August 9, 1995, by retaliating against Officer Dorothy Smith for filing a sexual harassment complaint against the District of Columbia Department of Corrections.

The court stipulated it would not impose a sentence of more than 180 days incarceration; accordingly, this proceeding was a non-jury trial. After considering the representations of counsel, the testimony of witnesses and the relevant law, the court for the reasons adduced on the record in open court, finds David Roach GUILTY of criminal contempt of court.

It is hereby ORDERED that Mr. Roach is sentenced to 180 days incarceration in custody of the Federal Bureau of Prisons. It is FURTHER ORDERED that David Roach be remanded forthwith to the custody of the United States Marshal.

SO ORDERED.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: 10-8-96

UNITED STATES DISTRICT COURT
FOR THE DISTRICT QF COLUMBIA

UNITED STATES OF AMERICA,	.	Docket No. CR MISC. 96-20
	.	
Plaintiff,	.	Washington, D.C.
	.	October 8, 1996
	.	11:25 a.m.
v.	.	
	.	
BERNARD BRAXTON DAVID ROACH,	.	
. . . . .		

TRANSCRIPT OF JUDGE'S RULING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

PROCEEDINGS

COURTROOM DEPUTY: Miscellaneous Case Number 96-20, In re: Bernard Braxton and David Roach.

THE COURT: All right. I had one evidentiary ruling that I took under advisement, and that was the admissibility of Government Exhibits 30 and 31. And I find that they are admissible, and they will be considered by the Court under Rule 801(d)(1)(B) as well as under Rule 803(24). I find that they are both admissible.

As to both defendants, I hereby find beyond a reasonable doubt that David Roach and Bernard Braxton are guilty of contempt of this Court's order of August 9th, 1995 by retaliating against Corrections Officer Dorothy Smith, because of her complaints that she had been subjected to sexual harassment as a guard at the maximum security facility of Lorton, Virginia, a part of the D.C. Department of Corrections.

Specifically, I find that the actions of Warden Roach as the decision maker on September 12th and September 19th, 1995 when be terminated Officer Smith's employment with the D.C. Department of Corrections were in violation of this Court's order because Warden Roach was terminating Officer Smith for legally protected activity.

I find that Mr. Braxton's decision on October 16th, 1995 to direct Mr. Roach to again take disciplinary action against Officer Smith was a violation of this Court's August 9th order as well, because Mr. Braxton was directing that Officer Smith be disciplined for engaging in legally protected activity.

Officer Smith made three separate sexual harassment complaints that have been thoroughly explored in this trial. After her first complaint, a fact-finding committee was appointed by Mr. Braxton. Testimony establishes that that committee did a poor job. It did not interview all the witnesses named by Officer Smith. It did not even follow up on the shower incident, which was to be the focus of fact-finding two, although that was reported to the first fact-finding committee by Officer Smith.

It found no probable cause for Officer Smith's complaint that Officer Nutter sexually harassed her and had recommended that Officer Smith and Nutter both received counseling. Mr. Braxton approved that committee's report and directed Mr. Roach to carrying out the counseling, which Mr. Roach did.

This was all completed by May 1995 well before my order of August 9th, 1995, but this evidence was admitted to show motive and intent for actions later taken by Mr. Braxton and Mr. Roach.

Officer Smith submitted a second sexual harassment complaint against Officer Nutter on May 23rd, 1995 raising what came to be termed the shower incident, which she had originally reported to the first fact-finding committee but which had never been investigated or followed up, as the Department's own procedures required.

Major Smith, who received officer Smith's May 23rd complaint, notified Mr. Braxton, and, at Mr. Braxton's direction, interviewed First Officer Smith on May 25th and then the inmate involved in the shower incident, Inmate Murray, on May 26th, and provided memoranda to Mr. Braxton, the first on May 25th about the interview with Officer Smith and the second on June 13th about the interview with inmate Murray. It is clear from

Major Smith's memoranda that Inmate Murray, at that time, largely corroborated Officer Smith's complaints.

Mr. Braxton then appointed a fact-finding committee on June 15th, 1995, but in a very curious way. Instead of construing Officer Smith's complaint to be a sexual harassment complaint as it was set forth by Officer Smith, he construed it to be a sexual misconduct complaint as though made by an inmate against the alleged sexual misconduct against the inmate. In this way, Mr. Braxton could pick the members of the fact-finding committee himself rather than forwarding the file to human resources where a fact-finding committee would be appointed from a list of people allegedly trained and experienced in dealing with sexual harassment complaints.

Daouda Lawrence and Joan Greenwood were appointed by Mr. Braxton on June 15th, 1995 to this fact-finding committee. Neither had any training or experience in conducting any such proceedings. And Mr. Lawrence's testimony in court demonstrated very well that he had personal views about those who filed sexual harassment complaints that should have disqualified him from any such appointment.

I acknowledge, however, that there is no direct evidence that either Mr. Braxton or Mr. Roach knew Mr. Lawrence's personal views at that time, although Mr. Lawrence and Mr. Roach did have some direct conversations in the committee process that leads the Court to conclude that Mr. Roach likely did learn those views from Mr. Lawrence when he talked about that fact-finding committee report directly with Mr. Lawrence.

The most curious thing about Mr. Braxton's June 15th memorandum is that, although it purports to be issued pursuant to the sexual misconduct regulation, it directs the fact-finding

committee, quote, to investigate the allegation of sexual harassment lodged against Officer Mark Nutter by officer Dorothy Smith, unquote. On its face, then, Mr. Braxton was clearly violating the procedures then in place for naming fact-finding committees to investigate complaints of sexual harassment.

The second fact-finding committee was an even worse disaster than the first one, if that's possible. They learned that Lieutenant Teixeira had interviewed Inmate Murray in June and that Murray was now saying the shower incident never took place.

The fact-finding committee met on July 11th and interviewed Officer Smith, Officer Nutter, and Inmate Murray. It's [sic] report does not indicate that Inmate Murray was placed under oath. It issued its report on July 13th. It never asked Murray to explain anything about what he originally told Major Smith. It simply concluded that Murray was now telling the truth and, therefore, that Officer Smith had made an unfounded charge of sexual harassment and, therefore, that she should be disciplined.

The second fact-finding committee's report went to Mr. Braxton who approved it. And he directed Mr. Roach to carry out the recommendations to initiate disciplinary action against Officer Smith in a memorandum dated July 17th, 1995.

The first significant factual dispute, then, this Court must resolve comes at this point. I find that Mr. Roach wrote the proposing official's memorandum, which was dated July 17th, 1995 and signed by acting Deputy Warden Harold Nelson. I credit Mr. Nelson's testimony that Mr. Roach gave him the memorandum to sign, that the memorandum was prepared by

Mr. Roach, and that Mr. Nelson then signed it.

I find that Mr. Nelson had no motive to fabricate his testimony on this point. His actions could not result in a contempt finding, because he didn't take any action after my August 9th order.

I also find that the slothful way in which Mr. Nelson's work as acting deputy warden was portrayed to this Court makes it impossible for me to believe that he sat down and independently figured out this charge and this proposed penalty and that he independently wrote this letter.

I, therefore, conclude that Mr. Roach's testimony is not truthful and that he propose to himself that Officer Smith be terminated from her employment.

Mr. Roach's actions as proposing official made it totally improper for him to then act as the deciding official. Nevertheless, because Mr. Roach was determined to fire Officer Smith for her protected activity, he did act as the deciding official on September 12th when he forwarded his final decision to human resources to terminate Officer Smith.

When Mr. Roach acted on September 12th, he had before him extensive supporting affidavits that Officer Smith's attorney had submitted to the disinterested designee. Mr. Roach did not in any contemporaneous document try to explain all this away, nor did he try to explain why he was overturning the recommendation of the disinterested designee that he not terminate Officer Smith. He simply decided that Officer Smith had made a false claim of sexual harassment and he fired her.

He now explains to this Court in his testimony that he

disbelieved all of the inmate affidavits submitted by Officer Smith's attorney because they were, after all, just inmates. And he proffers now that he disbelieved all the affidavits of the correction officers who had supported Officer Smith because he considered them substandard performers. Why substandard performers would necessarily give false testimony under penalty of perjury is not explained by Mr. Roach.

The affidavits and evidence submitted by Officer Smith's attorney cried out for further investigation. And Mr. Roach never acknowledged on the stand that he could have ordered a further investigation. Instead, he complained that it was up to Officer Smith to request a hearing before the disinterested designee. That is not true. And I find that Mr. Roach knew that was not true.

He could have ordered a further investigation by the disinterested designee, and he did not. Instead, Mr. Roach just plowed ahead and decided this was a false complaint based on the record he had before him.

The only real issue I have to decide in this case is whether his actions were just negligent or whether they were criminal by being willful. I hold that the actions were criminal, that he deliberately took this action because he knew the flaws of the fact-finding committees, and he had testified about them himself in December 1994 in a deposition in the Neal case, and he knew that this committee was not one of the supposedly newly trained fact-finding committees that were investigating sexual harassment complaints. He knew it was a committee that had been jerry-rigged by Mr. Braxton.

Mr. Roach apparently thought he would be safe with the committee's findings, that he could get away with this. I find his

actions are contemptuous of this Court.

I think what is most disappointing about what Mr. Roach did is that he has this strong background of support for female employees including his testimony at trial on behalf of the plaintiff Bessye Neal.

What is most disturbing about this entire contempt trial that we conducted last week is Mr. Roach's testimony that, as a result of his trial testimony in the Neal case, he was never treated the same again by Director Moore or by her executive staff. It's a sad commentary on the state of retaliation at the D.C. Department of Corrections when one of its most respected wardens cannot come to court and testify truthfully and not then be subjected to the disparate treatment by Director Moore and her top executive staff.

I don't know if that's what persuaded Mr. Roach to now join the ranks of the retaliators and the harassers, but, sadly, I find that that's exactly what he has done.

I don't think it's necessary to determine here whether my August 9th order protects every false claim. I will direct the parties in the Neal case to brief that issue so that there's no misunderstanding about that in the future.

But what I find here is that Mr. Roach's actions in firing Officer Smith constituted retaliation in any event, because he had absolutely no basis for weighing the conflicting evidence the way he did and because I find that his real reason for his action was retaliation against Officer Smith for making this sexual harassment claim.

When Officer Nutter called Mr. Roach after the second

fact-finding committee was appointed, Mr. Roach told Officer Nutter that he wouldn't have to worry about being charged from that institution again if Mr. Nutter were found not guilty. I find it really didn't matter to Mr. Roach whether the committee only found no probable cause or whether they found Officer Smith made a false claim. Mr. Roach had told Officer Nutter he was going to fire Officer Smith if she made an unfounded complaint, and he did.

Mr. Roach's current testimony in which he greatly embellishes the actual reasons he put in his September 12th decision memorandum just doesn't ring true when I consider his own deposition testimony about how he viewed these fact-finding committees.

Mr. Roach had signed a memorandum received on August 31st, 1995 that he had been given a copy of my August 9th order and that he had read it. To turn around and less than two weeks later conclude that he could fire Officer Smith for falsely claiming sexual harassment means to me that he didn't really intend to do anything personally to comply with my order.

He just plowed ahead, business as usual, following past practices and procedures, thinking he could just blithely go along with the Department's past directives and committees that the Court had decided were improper and make no changes whatsoever. Accepting flawed fact-finding committee reports, ignoring disinterested designee advice, and making arbitrary decisions that the Court found were the normal way of doing business at the D.C. Department of Corrections is exactly what the Court had ordered to stop.

Mr. Roach's claim that he didn't really know what lead to the Court's order is preposterous. In light of the extensive

news coverage of the Neal trial and the Court's orders and the extensive discussion of this problem by all the employees of the D.C. Department of Corrections, Mr. Roach had to recognize that the problem for years at the D.C. Department of Corrections was that women were afraid to make claims of sexual harassment for fear of retaliation. And this Court ordered that these women would be protected if they came forward.

This Court has not been presented with evidence that false sexual harassment claims being presented need to be addressed. Rather, than the Court is certainly not persuaded that there are all these false claims being made that need to be addressed and that the Court's order needs to be modified. On the contrary, the Court's findings throughout have been that women have been fearful of coming forward because they would face retaliation exactly as Officer Smith did.

For Mr. Roach to basically ignore all of Officer Smith's evidence, to refuse to have it investigated, to not even comment on the missing log books and why they were missing and whether they would have assisted Officer Smith, and for Mr. Roach to ignore the disinterested designee's advice and to ignore Officer Smith's complaints that the investigations were incomplete can only lead the Court to conclude that he was so anxious to fire Officer Smith that his actions must be considered retaliatory and not those of a calm, clear, dispassionate decision maker simply analyzing the evidence as he tried to portray himself to the Court.

In the posture of this litigation at the time of these actions, I believe there's no major employer in the country, public or private, that would have embarked on this disciplinary action against Officer Smith without seeking legal advice.

Mr. Roach's testimony that he never did is actually a sad commentary on the status of the office of the Corporation Counsel for the District of Columbia. It's a sad affair when the District itself has no procedures built in that will ensure that this question could have been properly resolved in a civil rather than a criminal context and that would have presented this question to the Court in a civil rather than a criminal matter.

I have tried to make clear repeatedly to the District and its officials that it must stop this retaliation against women who complain of sexual harassment. And because of the need for repeated contempt trials, I've made clear that continuing violations will be processed as criminal contempt of court.

With those warnings, these defendants act at their peril. And they engender no sympathy from this Court when they arrogantly and, bullheadly simply proceed as they did here.

There is [sic] three essential elements of criminal contempt under Title 18, United States Code Section 4013 [sic]. One, the Court entered a clear and reasonably specific order; two, the defendant violated it; and, three, the violation was willful.

I find first that the Court's August 9th, 1995 order was clear and reasonably specific. Its provided that every employee, agent, and other person operating under the direction and the control of the Department is permanently enjoined from engaging in sexual harassment or retaliation as defined below.

I then define retaliation as taking or threatening to take adverse employment actions against a person because he or she is engaged in legally protected activity. I then specified that adverse employment actions will include any negative change in

the terms, conditions, or privileges of employment.

I then specified that the term legally protected activity includes resisting or opposing sexual harassment, making oral or written complaints about sexual harassment, and testifying in, assisting in, or otherwise participating in an investigation of a sexual harassment complaint.

I specifically ordered that such activity is protected regardless of whether the conduct of which the employee complained was actually proved to have constituted sexual harassment.

I find that Mr. Roach violated the Court's August 9th, 1995 order as set forth above. I find that Officer Smith was fired for engaging in legally protected activity and that she was protected by this Court's August 9th order. I also find as set forth above that Mr. Roach's actions were willful and not merely negligent.

As to the Defendant Braxton, he did on appeal on October 11th set aside Mr. Roach's decision to fire Officer Smith and direct that she be reinstated with back pay. Mr. Braxton offered to the Court no explanation for that decision to set aside Mr. Roach's actions other than that there was new evidence. But all of the new evidence was in the record before Mr. Roach. It wasn't new on appeal to Mr. Braxton as far as the record here shows.

I still don't really understand what Mr. Braxton intended when he said that the proceedings against Officer Smith were dismissed without prejudice; but in any event, what is fatal to Mr. Braxton's case is that, on October 16th, he again directed Mr. Roach to take another disciplinary action against Officer

Smith, this time based on the third fact-finding committee report.

That report clearly demonstrated on its face that the male officer charged, Officer Konyn had submitted false evidence. Yet, the committee only recommended action against Officer Smith, not officer Konyn. And Mr. Braxton approved that. He approved, therefore, that no action will be taken again [sic] the male officer but that action would be taken against Officer Smith.

The committee's report was again equally flawed. The inmates were never even asked about their view on the question of whether Officer Konyn had made a statement about the big butt.

Mr. Braxton's excuse that he was just setting a disciplinary process in motion when he approved that fact-finding committee report is not acceptable to the Court. Although, he claims that he could later more closely examine the evidence was when there was an appeal, just as he did with the second fact-finding committee, that cannot be a way to avoid responsibility for what he did when he approved that third fact-finding committee report and ordered Mr. Roach to initiate yet another disciplinary action against Officer Smith.

When I consider Mr. Braxton's manipulation of Officer Smith's second sexual harassment complaint so that he could appoint the committee himself, I can only conclude that Mr. Braxton's actions weren't just negligent but, in fact, they were willful.

When I consider that Mr. Braxton directed Mr. Roach on July 17th to initiate the original disciplinary action with the second fact-finding committee report that he had jerry-rigged to

appoint the members himself, I again find that he acted willfully.

I conclude that Mr. Braxton was directing discipline against Officer Smith for legally protected activity, and, therefore, his actions on October 16th were retaliatory.

Again, I find my August 9th order was reasonably specific and that Mr. Braxton violated it and that his violation was willful.

Therefore, in accordance with the findings and conclusions announced by the Court, the Defendants Braxton and Roach are both found guilty of contempt of court.

Now, in light of the Court's earlier determination from acts and penalty imposed, and the case would be limited to 180 days, the Court will not require the preparation of pre-sentence report. We'll go forward to sentencing at this time.

The Government may proceed.

MR. BRAUN: Your Honor, the Government's position is that the Court sentence the defendants to a sentence that will deter any further conduct of this type on the part of employees of the Department of Corrections. Thank you.

THE COURT: Thank you, Mr. Braun.

Mr. Fisher.

MR. FISHER: Your Honor, if that's the Government's position, I suggest first of all that the Court doesn't need to give either one of these individuals any time in prison. I think everything the Court has done during the course of this trial,

what it has said already today, and obviously we strongly disagree with it, but I understand that the Court, what it said is sufficient deterrence.

And, again, it would be wholly inappropriate for this Court, even reaching the conclusions that it has, to look at Mr. Roach for this one act. He has been -- and it was unquestioned, unrebutted -- it was overwhelming that he has been one of if, if not the person, who has championed -- best championed women's rights in his Department. In addition, you've heard all of these other good things about his character.

Whatever the Court may think about his interpretation of the Court's order or the Department's interpretation of the Court's order, I don't believe that now sending him to jail will change matters.

What I would ask the Court to do, being that it has found him guilty, is to give him a suspended sentence. And I think the word has certainly gone out from here. This courtroom is at least half filled with people from the Department of Corrections who -- I can say this to the Court -- are certainly as confused about the Court's order if not more so than Mr. Roach in terms of what would be going on in this disciplinary process. And I ask the Court not to give him any jail time.

THE COURT: All right. Mr. Abbenante.

MR. ABBENANTE: Your Honor, just briefly, Your Honor's heard testimony about Mr. Braxton. This man has served the Department of Corrections for 26 years, unblemished record. He retired recently for a variety of health reasons.

And what I can ask the Court to do, Mr. Braxton did not

present any evidence on his own behalf, which Your Honor found incredible. He did not take the stand. He -- we presented what we believed was a fair interpretation of what Mr. Braxton's actions were in this case. As Your Honor already noted, he did overturn the appeal that Mr. Roach. We didn't think it was necessary during the trial to offer his personal explanation as to why he did, but you heard the reasons propounded by his assistant after their review.

As Your Honor obviously realize [sic], we disagree with the Court's interpretation of his sending down the line the third fact-finding committee. But there's absolutely no evidence in this -- that Your Honor has heard that Mr. Braxton even knew Officer Smith, had any dealings with her, and had any personal animosity towards her in any way.

Again, I would ask that Your Honor consider some form of community service as opposed to a term of incarceration for Mr. Braxton. If Your Honor does determine that incarceration is appropriate, I think that I would -- on behalf of Mr. Braxton, I would ask that Your Honor stay any prison term that Your Honor consider imposing for us to perfect our appeal and to litigate this on appeal. Thank you, Your Honor.

THE COURT: All right. The defendants can come forward with their attorneys, please.

Anything the defendants would like to say? I'll let you go first, Mr. Roach. I would certainly like to hear it.

DEFENDANT ROACH: Your Honor, with all due respect, I think the Court has misconsidered the evidence presented here. I stand very clearly on my testimony and my record. And I will refer the matter to my attorney for appeal.

Thank you.

THE COURT: Thank you. Mr. Braxton.

DEFENDANT BRAXTON: Your Honor, I did not jerry-rig that second committee. I understand that's what you believe, but I did not. And I no way intended to retaliate against Officer Smith. And that's honest.

THE COURT: All right. It's the judgment of the Court that, in light of the seriousness of the offenses and in light of the Court's need to deter similar misconduct, the defendant David Roach is hereby committed to the custody of the Attorney General to be incarcerated for a period of 180 days. Defendant Bernard Braxton is hereby committed to the custody of the Attorney General to be incarcerated for a period of 180 days.

Motion to stay pending appeal is denied. Address your arguments to the Court of Appeals. Defendants are remanded to the custody of the marshals.

MR. FISHER: Your Honor, just so the record is clear, I, too, would make a motion for stay of the execution of this sentence entered upon pending appeal. I think Mr. Roach satisfies quite clearly all of the criteria of 3143(b)(1), and that should require not just make discretionary this Court's allowance of him to be remain on bond pending appeal.

THE COURT: That's denied.

MR. ABBENANTE: Your Honor, in addition, the one thing that's different as opposed to Mr. Roach's situation, Mr. Braxton, Mr. Braxton is no longer in a position at the Department of Corrections where he could, in fact, exercise any

control over employees. And in that respect, I think the factual situation is a little bit different, and I would ask Your Honor to let him out pending appeal.

THE COURT: Denied. The Court will be in recess.

(The hearing concluded at 11:50 a.m.)

REPORTER'S CERTIFICATE

I, Vicky J, Stallsworth, RPR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Vicky J. Stallsworth
Vicky J. Stallsworth, RPR, CRR

APPENDIX C
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 96-5244 September Term, 1995
96ms00020

In re: David D. Roach,
Petitioner

BEFORE: Henderson, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the lodged emergency petition for writ of mandamus, and the motion for waiver of page limits, it is

ORDERED, that the motion for waiver of page limits be granted. The clerk is directed to file the lodged petition. It is

FURTHER ORDERED that the petition be denied. Petitioner has failed to establish that is right to the extraordinary relief requested is "clear and indisputable." See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); In re Barry, 946 F.2d 913, 914 (D.C. Cir. 1991) (per curiam). To the extent petitioner seeks to compel the district court to recuse, petitioner has not established the sort of bias required for judicial disqualification. See Liteky v. United States, 114 S.Ct. 1147, 1155-57 (1994). Nor has petitioner established that the district court is prohibited from ruling on the

sufficiency of the recusal motion under 28 U.S.C. § 144. Finally, petitioner has not established his right to a jury trial. See Cadispoti [sic] v. Pennsylvania, 418 U.S. 506, 511 (1974).

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

By: /s/ Elizabeth V. Scott

Deputy Clerk/LD

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 96-3119 September Term, 1996
96ms00020

United States of America,
Appellee

v.

David Roach,
Appellant

Consolidated with 96-3120

BEFORE: Edwards, Chief Judge, Wald and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed May 15, 1997, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 96-3119 September Term, 1996
96ms00020

United States of America,
Appellee

v.

David Roach,
Appellant

Consolidated with 96-3120

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BESSIE NEAL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	93-2420 (RC)
	)	
DIRECTOR, D.C.	)	
DEPARTMENT OF	)	
CORRECTIONS, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the court on plaintiffs' motion for an order to David Roach and Bernard Braxton to show cause why they should not be held in criminal contempt of court. Plaintiffs have withdrawn their motion for a preliminary injunction. Defendants have filed an opposition to plaintiffs' show cause motion, and plaintiffs have filed a reply.

It is hereby ORDERED that plaintiffs' motion for an order to show cause is GRANTED. David Roach and Bernard Braxton are hereby ORDERED to show cause why they should not be held in criminal contempt of court for violating this court's Final Judgment and Order III, filed August 9, 1995, by retaliating against officer Dorothy Smith for complaining of

sexual harassment.

Messrs. Roach and Braxton shall appear in court for a status conference on January 8, 1996, at 2:00 p.m., with counsel if they are represented by counsel. If they are unable to obtain counsel, they shall report to the Office of the Federal Public Defender, 625 Indiana Avenue, N.W., Washington, D.C., no later than January 4, 1995 [sic], to complete a financial disclosure affidavit so the court can determine whether they qualify for court-appointed counsel.

Plaintiffs shall effect prompt service of this order on Messrs. Roach and Braxton. Defendants are directed to provide plaintiffs with home addresses of Messrs. Roach and Braxton, or make other appropriate arrangements to facilitate timely service.

The court will not impose a criminal sentence of more than 180 days incarceration on either party; accordingly, this proceeding will be a non-jury trial

SO ORDERED.

Date: 12 - 20 - 95

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX E
CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been comitted; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CODE tit. 28, § 144, provides:

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed no less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one

such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

UNITED STATES CODE tit. 28, § 455, provides, in pertinent part:

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

UNITED STATES CODE tit. 42, § 2000h, provides, in pertitent part:

§ 2000h. Criminal contempt proceedings; trial by jury, criminal practice, penalities, exceptions, intent; civil contempt proceedings

. . . In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BESSYE NEAL, et al.	:	Civil Action No. 93-2420
Plaintiff,	:	
v.	:	Washington, D.C.
	:	Tuesday, June 7, 1994
ERIAS HYMAN, INTERIM DIRECTOR, DEPARTMENT OF CORRECTIONS,	:	2:10 p.m.
Defendant.	:	

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EXCERPT
TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

. . . I must say that on this record it seems to me that these Department of Corrections' officials act like the perjury statute is meaningless, and I want to send a clear message today that I have news for those officials: if the U.S. Attorney will not prosecute perjury in my court, I will undertake a contempt-of-court action for perjury of any Department of Corrections' official that testifies falsely in this proceeding, and I will appoint an independent counsel, and I have the authority to appoint an independent counsel. And if the U.S. Attorney doesn't want to proceed, I will appoint an independent counsel and an independent counsel will prosecute any perjury that appears in my court, in any deposition or testimony that is given in my court. I will deem it to be a contempt-of-court, and I will have a special counsel appointed, and I will have the matter prosecuted. I am not going to allow continued perjury to go on here. Whether or not the U.S. Attorney wants to address it, I want the message to go out I can address it and I will address it. And for a sentence of 180 days or less, there is no jury trial in my court. I will determine the perjury matter. There is no right to a trial by jury.

* * * * * * * * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BESSYE NEAL, et al.,	:	Docket Number: CA 93-2420
Plaintiffs,	:	
v.	:	Washington, D.C.
	:	Friday, Dec. 16, 1994
MARGARET MOORE	:	9:47 a.m.
DIRECTOR,	:	
DEPT. OF	:	
CORRECTIONS,	:	
Defendant.	:	

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EXCERPT
TRANSCRIPT OF SHOW CAUSE HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE
DAY 3

Counsel should meet and confer about the procedure to implement this decision, and we'll discuss those procedures and the exact implementing order at next week's status conference.

The Court also rules that plaintiffs, having prevailed on all three motions for contempt, are entitled to attorneys' fees and costs on all three motions for contempt. This will provide some compensation for the plaintiffs' damages that have resulted from the defendants' contumacious actions.

The Court also wants to make one other thing crystal clear. I've only had one other case in my tenure on the bench where I had such great difficulty in getting the defendants to obey a preliminary injunction. That also involved a case of the District of Columbia, Sexius (ph. sp.) versus the District of Columbia, and I'll say here just what I said there. I don't issue fines to government officials who disobey court orders. That simply places an additional burden on an already overburdened taxpayer. It doesn't hold the government officials personally accountable. So I want to be sure the defendants know my philosophy. I put government officials who disobey court orders in jail, and I keep them there until my orders are carried out.

I have ordered the retaliation against these plaintiffs to stop, and it will stop.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BESSYE NEAL, et al.	:	Docket Number: CA
	:	
Plaintiffs,	:	93-2420
	:	
v.	:	Washington, D.C.
	:	Wed., Jan. 31, 1996
DIRECTOR,	:	9:39 a.m.
D.C. DEPT. OF	:	
CORRECTIONS	:	
	:	
Defendant	:	

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EXCERPT
TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

THE COURT: Well, explain to me with those measures, why the District could be in such a preposterous position as firing a woman who comes forward and claims sex harassment and then the District decides to fire her for making that claim? How could the District get in such a posture? I understand the firing is rescinded, but if all these new procedures are so wonderful, how could the District have screwed that up so badly?

MS. BELL: Your Honor, as I said, the District -- well, the Department of Corrections employs about 4,000 people, and it's not our position that either Mr. Roach or Mr. Braxton did anything wrong with regard to their role in the Dorothy Smith --

THE COURT: Exactly. That is your problem.

MS. BELL: Well, what --

THE COURT: Because you won't admit today they did anything wrong by firing a woman who only came forward and claimed sex harassment.

MS. BELL: Your Honor, what we can say at this point is that your understanding of the facts in the Dorothy Smith matter are different from ours. There were three fact-finding committees with regard to the Dorothy Smith matter, and as you know, the Court has not made any ruling with regard to the truth or the veracity of either Mr. Roach or Mr. Braxton's position, and I assume that this exchange has nothing to do with the validity of Ms. Smith's position.

THE COURT: I understand. I just found probable cause, in effect, by that order to show cause. But, go ahead.

MS. BELL: Our issue is, with regard to Dorothy Smith there were three fact-finding committees, and I don't really want to go into the particulars of that particular case, because I think that that's before you on a different issue, but the point is there are measures that have been implemented that weren't earlier that have changed the nature of the --

THE COURT: Since then?

MS. BELL: Since -- yes, because we have a new policy and procedure that we keep retooling to help Ms. Moore advise her staff about how to handle --

THE COURT: If the final decision maker said to Roach and Braxton, "Don't fire her" -- the final recommendation by the disinterested official was don't do it, and they did it anyway, right?

MS. BELL: Your Honor, is this with regard to Ms. Smith?

THE COURT: Right. Wasn't that the facts? Ms. whoever her name was, Gilmore-Moye or somebody or other, the disinterested decision maker said, "Don't do it. There's no basis to do it." And they went right ahead and said, "We're going to fire you because you falsely claimed sex harassment." Has some procedure changed since they did that?

MS. BELL: Your Honor, yes, there have been some changes that have occurred at the end of the year, but with regard to that particular issue, as I said, you know, the Court's understanding of those facts and our understanding is different. There was evidence, as far as we are concerned, that Ms. Smith did, as I understand it, did make some representations which

somebody deemed to be the possibility that they might be false, but I really don't want to get into the specific --

THE COURT: I understand, but the disinterested decision maker said they weren't false.

MS. BELL: Not in all cases. There were three fact-finding committees. That's the point I'm trying to raise.

THE COURT: I understand, but the fact-finding committees don't mean anything to me from this trial. You haven't cured anything about those. And I'm talking about the disinterested decision maker. I thought she found that Ms. Smith had made a proper claim and she couldn't be fired, and they went ahead and fired her anyway; isn't that right?

MS. BELL: Your Honor, as I said, I don't really want to get into the details and the particular facts of the Dorothy Smith matter. For one, I am not completely versed in it, but as I understand, that there was one more -- excuse me -- there was more than one designee with regard to looking at the fact-finding committees, and I might add that our position is that the fact-finding committees that are at the agency today are not the fact-finding committees that was [sic] at the agency at the time during this trial.

The whole purpose of our argument is that there have been many measures that have changed as a result of that trial and as a result of some of the allegations.

THE COURT: I understand, but if you're going to stand here and tell me the measures today are adequate, you've got to answer what happened in Dorothy Smith, and you can't answer it.

MS. BELL: What I'm saying is, is the measures that we have implemented today than the measures that were implemented --

THE COURT: They may be different, but there's no indication to me they're adequate in light of what happened to Dorothy Smith.

MS. BELL: Your Honor, as I understand it, you've already made a decision with regard to the Dorothy Smith matter before?

THE COURT: I haven't decided that but you can't answer how you can fire somebody for claiming sexual harassment. I don't know how you can do it. I'm going to get Braxton and Roach in here and tell me how they think they can do it, but I sure don't understand it, and I haven't had D.C. explain to me how you can fire somebody for coming in and making a claim of sexual harassment.

MS. BELL: Well, Your Honor, I think I answered that. We cannot fire somebody for making a claim of sexual harassment, and it's our position that --

THE COURT: Well, isn't that what they purported to do?

MS. BELL: No. It's our position that Dorothy Smith was not fired for that reason.

THE COURT: She was fired for making a false claim of sexual harassment?

MS. BELL: That's correct. With regard to the

investigation --

THE COURT: And the fact-finding committee found it was false, and the disinterested decision maker found it was not false?

MS. BURROUGHS: Your Honor, may I just address the Court?

Your Honor, the issue is that there is a provision in the departmental order that puts individuals on notice of potential disciplinary action should they file a false claim of sexual harassment.

THE COURT: Right.

MS. BURROUGHS: That's not a claim that there is simply a no probable cause finding. That's a claim where they have reason to believe that some aspect of the claim was intentionally misleading or false.

THE COURT: Right.

MS. BURROUGHS: A disinterested designee under the District personnel manual is only a recommending official. It is one of the checks and balances of the Chapter 16 process. The deciding officials have no obligation to accept the recommendation of the disinterested designee. They certainly should take it to heart --

THE COURT: And when there's an outstanding injunction against retaliation, you don't think that deciding official had any obligation to come and inform the Court before he went forward to fire Dorothy Smith? It's preposterous.

MS. BURROUGHS: Your Honor, I can't speak to that at this time. I don't see --

THE COURT: Did that deciding official talk to any lawyer?

MS. BURROUGHS: Not that I'm aware of.

THE COURT: Then how can you say your procedures are effective? The deciding officials don't consult with the corporation counsel. They don't bother to follow the Court's injunction. They just blithely go along. And you want a stay because everything is wonderful and you have cured everything. I don't see how anything is cured.

MS. BURROUGHS: Your Honor, I'm simply trying to clarify for the Court the process at this point.

THE COURT: Boy, you've clarified it.

* * * * * * * * * * * * *

APPENDIX G
- 6 -

In response, the trial court has filed--largely verbatim--findings drafted by plaintiffs' counsel, only occasionally supplemented by comments of its own.[3] Most of the court's own observations consist of accusations against the Department of Corrections and its counsel of "sheer arrogance," "blatant and widespread disrespect," "knowing misconstru[ction]" of the record, "ludicrous" and "dishonest" arguments, interrogatory answers "not compiled in good faith," and appellate briefs "so misleading as to be virtually dishonest,"[4] accusations which have no record support.

The district court's statement of reasons requires a

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3 This Court has expressed its disapproval of verbatim adoption of proposed findings in ordinary cases. *Berger v. Iron Workers Local 201*, 269 U.S. App. D.C. 67, 76, 843 F.2d 1395, 1404 (1988), *cert. denied*, 490 U.S. 1105 (1989). Other courts have been equally critical. *See* 9 C.A. Wright & A.R. Miller, FEDERAL PRACTICE & PROCEDURE, CIVIL 2D (1994) § 2578.

The trial court's verbatim repetition of a litigant's tendentious findings should be even less acceptable here, where the court has been asked for its *own* explanation of its actions and why it believed that a lesser sanction would have delayed trial, prejudiced plaintiffs, conferred benefits for disobedience, or would fail to deter.

4 S.A. 47 ¶ 2h; 51 ¶ 7 & n.1; 53 ¶ 10; 59 ¶ 18; 56 ¶ 14; 58 ¶ 18. "S.A." refers to the supplemental appendix.

supplementation of the facts of this case.

1. PRODUCTION OF DOCUMENTS. The district court purports to review the District's compliance with discovery requests as "context" for its selection of the extreme discovery sanction at issue. S.A. 44. However, because discovery material was not filed with the court, the district court was not familiar with the extent of the Department's response to the discovery request. Its statement contains not a single reference to the volume of discovery that the Department had generated months before the sanction had been threatened and imposed.